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FORMATION OF CONTRACT *INTER ABSENTES.*

THE question of the formation of contract between parties who are not in each other's presence has been discussed for many years, and there are still mooted points as to when and where such a contract arises, and what is essential thereto. Naturally, this question has generally arisen through the employment of the mail which has often led to a discussion concerning such contracts and sometimes to the conclusion that offer and acceptance by mail involve some doctrines *sui generis*, and that they are to be considered and explained as exceptions to the general rules. But while the most divergent views have been advanced as to the principles involved, the law itself both in England and in this country may be considered as finally settled[1] to the effect, that when an offer is sent by mail with no specific directions as to forwarding an acceptance, the contract arises as soon as a letter of acceptance properly addressed and with postage prepaid, is mailed. In Massachusetts, a contrary view was enunciated in McCulloch *v.* Eagle Ins. Co.,[2] to the effect that " The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants, until the letter announcing the acceptance

[1] But see *contra*, Underwood *v.* Maguire, Rap. Jud. Quebec, 6 B. R. 237. This case was decided in 1895 by a divided Court. It is not well reasoned and throws no new light upon the subject. [2] 1 Pick. 278.

was received, or at most, until the regular time for its arrival by mail had elapsed."

On the strength of this case, the Massachusetts rule has been regarded as differing from that of most jurisdictions in this country. It was well known, however, that Mr. Chief Justice Holmes took the other view,[1] and the case of Brauer *v.* Shaw,[2] decided in 1897, while not necessarily involving this question, seems to indicate a change of position in that jurisdiction.[3]

In Bauer *v.* Shaw,[2] an offer was sent by telegram from Boston to New York and duly received. An acceptance was telegraphed in New York at twenty-eight minutes past twelve and was received in Boston at twenty minutes past one. At one o'clock the offerors at Boston telegraphed a revocation. The Court held that a contract arose and that the attempted revocation was ineffectual because not communicated before acceptance. No question is raised in the case as to whether the New York or Massachusetts law should prevail[4] but as the acceptance was actually received before the revocation was communicated to the offeree, it would seem that a contract would arise under either theory. Mr. Chief Justice Holmes, however, says in writing the opinion of the Court: "There is no doubt that the reply was handed to the telegraph Company promptly, and at least it would have been open to the jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then the offer was outstanding when it was accepted, the contract was made."

It seems evident from these facts that the Court actually decides nothing more than that a revocation of an offer must be communicated to the offeree, but nevertheless, the

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[1] Holmes Common Law, pp. 305, 306. [2] 168 Mass. 198.

[3] Commonwealth Ins. Co. *v.* Knabe Co., 171 Mass. 265.

[4] It would seem that New York was *locus contractus* and therefore that the New York law should govern as to the formation of the contract. The offer was clearly made in New York because it was communicated there and communication to an offeree is, of course, of the essence of an offer. The offer having been made in New York, an act was then done which by the New York law constitutes an acceptance. As then we have acts happening in New York which constitute offer and acceptance there, it would seem that the contract arose there, and that the New York law governed. See Perry *v.* Mount Hope Iron Co., 15 R. I. 380; Commonwealth Ins. Co. *v.* Knabe Co., *supra*.

case is regarded by high judicial authority in Massachusetts as quietly overruling McCulloch *v.* Eagle Ins. Co.,[1] and conforming the Massachusetts Law to that of the rest of the country.

The rule thus adopted by most Courts has been ably criticised by Professor Langdell.[2] He treats the subject from the standpoint of a bilateral contract, and his argument may be summed up thus: the acceptance is a counter promise and as such must first be an offer, and therefore must be communicated. If this premise be correct, it seems impossible to escape from his conclusion.

It will aid in the consideration of this question to determine what is meant by the term acceptance in the law of contract, what are its functions and its elements. The distinguishing feature of contract is the assent of the parties—the intent of each that the law shall annex to their mutual acts the obligation of contract. This intent by each party, when suitably manifested, is called mutual assent. By the first step, *i. e.*, the offer, the offeror indicates to the offeree his desire that a contract should arise between them containing certain terms. At that point the intent and wish of one party only is known. In order that a contract should arise, it is evident that the next step must be a manifestation by the offeree that he also wishes the proposed arrangement contained in the offer to ripen into a contract. The manifested assent of the offeree shows that the parties are of one mind, and that constitutes the agreement, the mutual assent. But it does not at all follow that in order to constitute mutual assent there must be knowledge on the part of each that the agreement is reached. Were knowledge by each party that the contract has arisen essential, it would be necessary to reach the logical but absurd conclusion that parties could not contract unless in each other's presence, because, where the contracting parties are not together, it is impossible for each to know that the contract has arisen at the precise instant it arises, the knowledge of at least one of the parties must come at a period subsequent to the origin of the contract. For instance, if the contract does not arise until the acceptance is communi-

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[1] *Supra.* [2] Summary of the Law of Contracts, § 33.

cated to the offeror, but does arise at that instant, then the offeree is in ignorance of the fact of communication to the offeror, *i. e.*, the contract would arise without his knowledge. Take the familiar case of a unilateral contract, and suppose a householder descends his front stoop some snowy morning, sees a man with a snow shovel going by, calls out "Clear my sidewalk and I will give you fifty cents," and then hurries off down town before the shovel man makes reply. The man, however, does shovel off the snow in pursuance of this offer. No one can doubt that a contract arises as soon as the act is completed, and yet the householder, the offeror, is down town, and neither has the acceptance been communicated to him, nor does he know that the contract has arisen. He is bound without such communication and without such knowledge.[1] There would seem to be no doubt, then, that an acceptance as such and containing no other element requires no communication.

But, it is truly said, where an offer contemplates a contract consisting of mutual promises, in other words, a bilateral contract, the acceptance contains the further element of a counter promise on the part of the offeree. In such a case, the mere acceptance unless it contains a promise directly or by implication, is not enough, any more than it would be in the case of a proposed unilateral contract, because in a bilateral contract the counter promise is requisite to furnish the consideration for the promise into which the original offer ripens. Does this element of counter promise render communication necessary? If this counter promise must first be an offer, then communication certainly is necessary because, *ex vi termini*, an offer implies communication, and Professor Langdell's contention would appear to be irrefutable. But is the counter promise necessarily first an offer? It does not seem so, and there appears to be no principle which requires that this position be taken. What is there about a promise that would indicate the necessity of its being first an offer? It is true that we often do have an offer which subsequently ripens into a promise, but because some promises are first offers, it by

[1] It will, of course, be kept in mind that this paper is considering only the formation of contract, and hence is not concerned with conditions which may be found in the contract when formed.

no means follows that all promises must go through this process. Nor does there appear to be any special reason for so holding in the case of a proposed bilateral contract.

It may be said that there is no promise until communication, and that, therefore, the counter-promise is only an offer until such communication; but this is not so because, as shown above, it is not even an offer until there is communication.

It seems clear that the proposed acceptance becomes a promise as soon as it is anything at all.[1]

This leads to the next question which is, does a promise, as such, require communication to the promisee? This seems to require a negative reply. It is difficult to find any element in a promise which necessitates communication. Suppose that a publisher sends a book to some one with a statement that the price is ten dollars and he hopes the recipient will purchase it. Suppose, further, that upon receipt of the book the proposed purchaser decides to buy it and appropriates the book by unmistakable acts. Is there not an implied promise to pay the price—not a so-called promise implied in law, a quasi-contract, but a true promise implied in fact from the act of appropriation? There seems to be no good reason for holding that this is not a case of a promise, and yet the publisher may and probably will be ignorant of this implied promise at the time it is made. It may be urged that debt would lie for the price of the book, but this does not show that special assumpsit will not lie also. In Fogg *v.* Portsmouth Athenæum,[2] it seems clear that a promise arose upon the appropriation of the newspapers although the publisher may have been ignorant of such appropriation. That was a case in which a publisher of a newspaper sent papers to a public library under circumstances which the Court rightly held did not constitute an express contract. The library company appropriated and used the papers after being apprised that they were not intended as a gift. The Court held the library company liable, although the opinion does not make it clear whether they decided upon the theory of quasi-contract or of a true contract implied in fact.

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[1] See Holmes' Common Law, pp. 305, 306. [2] 44 N. H. 115.

There seems to be no sufficient reason for maintaining that the obligation in these cases is quasi-contractual, because it is evident that the party intends to be bound, and such intent supplies the characteristic of a true contract. That is to say, the obligation which the law imposes is contemplated and intended by the parties, and we have mutual assent. A promise is simply an obligation which is placed upon a party as the result of his acts, and this obligation differs from tort in that the party obligated intends that this result shall follow. An obligation can arise in tort without any communication to the one wronged, and why not in contract? Once find mutual assent with consideration and the elements of contract are there. Thus when the act is tendered for a desired promise, the consideration is furnished and the willingness to accept the promise indicated. If the consideration is accepted and the promise intended, why is there any necessity for communication to the promisee in order that the intended promise shall actually arise? Suppose an offer contemplating a bilateral contract, to be sent by mail. This first offer becomes a promise when the consideration, the counter-promise, is furnished. But if it is held that this counter proposition must first be communicated because a promise must be communicated, then we seem forced to the conclusion that the first offer cannot ripen into a promise until again *communicated as a promise*, because a promise requires communication. That is to say, when first communicated to the offeree it is merely an offer and cannot become a promise until the counter-promise is communicated to the offeror, but at that time the first promise as a promise, is not communicated to the original offeree. Can it be properly said that the communication of the first offer is enough for the subsequent promise into which it is to ripen? If there is any element of a promise which as such requires communication, the conclusion must be reached that communication of the offer will not do for the subsequent promise. In other words, we seem to have the difficulty of an endless chain suggested by the earlier cases on this subject. Professor Langdell is not forced to this conclusion, because his only claim is that the counter proposition is an offer, but he must necessarily agree that the prom-

ise arising from the first offer, need not be communicated. If we agree that the counter proposition need not first be an offer, then it seems logical to hold that it is a promise as soon as made manifest. This leads to further questions. Suppose the first offer to be communicated by mail, is it enough for the offeree to say to surrounding friends, I accept the offer contained in this letter? Or suppose further the case of two men together and an offer spoken by one, may the other accept by turning to friends in his rear and whispering such acceptance? If there was nothing further than a promise required, it would seem necessary to reply in the affirmative. But we must not forget that an offeror may attach to his offer terms or stipulations in reference to the mode of accepting such offer. He may stipulate that the acceptance must be received by him, that it must be sent by telegram or in fact any method he pleases and the acceptance can then take place only in the way designated. These stipulations may be implied as well as expressed and therefore it is reasonable to say that to every offer contemplating a bilateral contract there is the implied stipulation that the counter-promise shall not only be made manifest but be put in a reasonable way to be communicated to the offeror. What may be such reasonable way must depend upon the circumstances of each case. In the illustrations given above, the reasonable way to put such counter-promise in the case of the offer by mail would be a reply by mail, and in the case of the spoken offer, a reply to the offeror. As these are the means impliedly required by the method of sending the offer, the acceptance must comply with them. The offeror's aim is, however, to secure an answer in a certain time, and hence any other method of accepting will do, provided the acceptance reaches the offeror as soon as it would by the means indicated in the offer.

This view may be illustrated by two or three examples. Suppose a totally deaf man make an offer by word of mouth to one who does not know he is deaf, and the offeree replies, "I accept." If then the deaf man hands over a slate and the other writes, "I do not accept," it would seem that a contract arises and that when the deaf man learns the facts from the bystanders he can hold the other to a promise, which promise arises without communication.

In the case of Felthouse *v.* Bindley,[1] Paul Felthouse, after previous negotiations made an offer by letter to his nephew John for the purchase of a horse. This letter terminated with the words, "If I hear no more about him, I consider the horse as mine at £30, 15s." No reply was made to the offer and the words quoted negative the idea of implied terms accompanying the offer requiring reasonable effort to forward a reply, and, therefore, no reply was necessary. If the nephew John had at once shown by distinct overt acts that he accepted the offer; if, for instance, he had put the horse in a stall marked Paul Felthouse, or had shown his intention by other appropriate action, it would seem that on principle a contract would have arisen then and there. As it was, however, the uncle's offer was made on January 2d, and there is nothing in the facts given to show that the nephew indicated any intention to accept until February 26th, at which time the uncle's offer would certainly have expired by reasonable limitation, and it would be immaterial that the uncle by unevinced mental determination may have been satisfied to continue his offer. On this ground alone, it seems that no contract arose.

In White *v.* Corlies,[2] the defendants wrote to the plaintiff, a carpenter, directing him to proceed at once to fit up their office. There is room for doubt as to what this letter really meant, but the Court treats it as an offer. The plaintiff at once began performance by the purchase of lumber and by beginning work thereon. The Court, Folger, J., writing the opinion, says:

"We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail, containing a proposal, may be answered

[1] 11 C. B. N. S. 868. [2] 46 N. Y. 467.

by letter by mail containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him."

It would seem, then, that if the plaintiff had evinced his intention to accept by clear and unmistakable overt acts, and had complied with the implied terms of the offer to take reasonable steps to apprise the defendants thereof, a contract would have arisen. Or if the offer had negatived this implication as in Felthouse *v.* Bindley,[1] it would appear that a contract would have arisen as soon as the acceptance was sufficiently evinced. In fact, in view of the words of the offer "you can begin at once," it is a question whether this offer, also, did not negative the implication of a term requiring reasonable steps to notify. This treats the offer as calling for a bilateral contract, and that must have been the view of the Court, for otherwise the short answer to the plaintiff would have been "you have not furnished the consideration, *i. e.*, the act, and hence there can be no contract."

The views expressed above lead to a conclusion which accords with the law as found in the decisions, they logically account for the cases of contract arising upon the mailing of an acceptance, for such cases as Howard *v.* Daly,[2] and others of a similar character.

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[1] *Supra.* [2] 61 N. Y. 362.